

HUMAN SERVICES BOARD

INTRODUCTION

FINDINGS OF FACT

3. The petitioner did not appeal the substantiation until May 23, 2001, shortly after he lost his job as a crisis

intervention counselor for children and adults. He says he lost the job based on the substantiation in the record. He did not explain why he waited so long to appeal the substantiation.

4. Following the appeal, SRS conducted a "Commissioner's Review" of the substantiation which took several months. The commissioner's representatives considered all of the social work and police records which they could find and re-interviewed the alleged victim, her mother and the alleged perpetrator. The petitioner, on his own, arranged for and took a polygraph test in July of 2001, the results of which he supplied to SRS.

5. A written review dated January 25, 2002 was sent to the petitioner in which the commissioner reaffirmed the former substantiation. It is SRS' position that the petitioner sexually abused C.E. based on its finding that the petitioner held her down against her will, rubbed his pelvis into her and moaned while doing so.

6. In support of its finding, SRS called both the alleged victim and her mother as witnesses at the hearing. The mother testified credibly that in 1992, her family lived near that of the petitioner's and that the families were acquaintances. The petitioner's daughter and her daughter,

C.E., were friends. Sometime in late 1992, C.E. came to her mother along with another friend and that friend's mother and told her that she had felt uncomfortable about an occurrence at the petitioner's house earlier that year. C.E. had been encouraged to report this event by the friend and her mother with whom she had first shared her allegations.

7. C.E.'s mother stated that her daughter told her that the petitioner had gotten on top of her in the bedroom in the course of a game and would not get off of her. The mother, alarmed about the report, shut off all contact with the petitioner's family and took her daughter to counseling. In the course of the counseling, the mother reported the event to SRS. She was thereafter interviewed by both police and social workers although the mother does not recall many of the details since the report took place almost ten years ago. To the best of her knowledge, her daughter had not had any sexual contact of any kind before this event. The mother's testimony is found to be credible.

8. The alleged victim, C.E., testified that she was friends with E.D., the petitioner's then nine-year-old daughter, during 1992 and went to her home about twice a week to play and sometimes to stay overnight. On one evening, she recalls that she and E.D. were alone in the home with E.D.'s

father. She and E.D. decided to play hide and seek. E.D.'s father joined in saying it would be more fun to play in the dark because it would be harder. She recalls that E.D. hid in the bathroom and she hid in a bedroom on a bed under the covers. She recalls that E.D.'s father came into the bedroom to find her. She testified that he pulled off the covers and got on top of her, rubbed his genitals against her and moaned like he enjoyed it. She said he held her arms down as she screamed for the petitioner to get off of her but he would not do so. She cried to her friend to turn the lights on. E.D. did turn the lights on after some minutes at which time the father got off of her "nonchalantly" acting like it was a game. C.E. could not say how long she was held down, testifying variously that it was fifteen or ten or five minutes. She could not say for sure whether she was on her stomach or back when the rubbing occurred although she believed she was on her stomach. She does recall with certainty that he was rubbing between her legs and moaning and that she felt that he was doing something wrong. She blamed her inability to remember all of the details on the passage of ten years and said that statements she made at the time of the event would be most accurate as to these details. She did not review those reports prior to her testimony.

9. Afterward, C.E. said she was upset and confused about this event and never went back to the petitioner's house. Up to that time she had no sexual experience and did not know what to make of the event, only that it made her very uncomfortable. She confided her experience to a friend who told her parents. The parents then advised C.E. that she should tell her mother about this and helped her to do so. She thinks she finally told her mother about this event around two months after the occurrence but says that it could have been as much as six months later.

10. C.E. was very distressed during her testimony and was upset that she had to be in the same room with the petitioner again. Her affect seemed to be that of a person recalling a genuinely painful experience. This affect in combination with her actions in avoiding the petitioner after this event make her version of the events highly credible. Her inability to remember all of the details given the passage

of so much time is understandable and does not impair her credibility.¹

11. The petitioner believes that C.E.'s allegations stem from a game he used to play with his two daughters, who were a few years younger than C.E., called "Quasimodo". He would dress as a hunchback (stuffing a towel in his shirt) and make scary "grunting" noises chasing the children through the house in the dark. He would catch the girls by the arm or leg and they would squeal with delight and help each other to get free. He believes he was playing that game one night that C.E. was there. While he does not recall rubbing up against her on the bed, he says that it is possible this occurred during the course of the game and that it was nothing more than silliness and physical grabbing. He recalls that C.E. was laughing that night and did not act distressed. He also denies that his wife was not home at the time.

¹ The petitioner pointed out the victim's inability to remember all of the details of the event in an attempt to undermine her credibility. It cannot be forgotten, however, that the timing of this appeal, almost ten years after the alleged event, was the work of the petitioner himself. While a person placed in the registry does have the right to appeal "anytime" under the statute, attempts to profit from this delay by attacking witnesses' time-battered memories cannot in fairness be looked upon with favor. In addition, the petitioner did not introduce any of the contemporaneous statements made by C.E. to either impeach her or support his case. The inference must be made, therefore, that these contemporaneous reports were detailed and consistent at the time they were made.

12. The petitioner believes that almost a year passed before SRS and the police contacted him with regard to this event. He was asked to take a polygraph test at that time but avoided it by telling the police that he had hurt his thumb in a wood-splitter. While he had hurt his thumb, the petitioner said the real reason he did not take the polygraph test was on the advice of his attorney.

13. In July of 2001, the petitioner arranged for his own polygraph test which he wished to put into evidence. The hearing officer told the petitioner's attorney that she was disinclined to take such evidence based on its unreliability but that the petitioner was welcome to brief the issue and she would reconsider his request. The person who administered the test was not available at the time of the hearing but was to be called to testify if the hearing officer ruled that the evidence was admissible. The petitioner never offered any brief in support of his position nor did he offer the testimony of the polygraph expert again.

14. The petitioner's testimony that he was only involved in an innocent game is unpersuasive. It is hard to imagine any context in which it would be appropriate for a grown man to grab or get on top of an adolescent female visitor in the dark. Furthermore, the petitioner's willingness to lie to the

police to avoid a polygraph test reflects poorly on his honesty. Finally, although the petitioner claims that his wife was present throughout this event, her testimony was not offered to corroborate either her presence or the petitioner's version of the events.² These facts make it difficult to credit the petitioner's denials.

15. It is found based on the credible testimony of C.E. that the petitioner placed his body on top of hers at a time when she was twelve-years-old and that he held her down, ground his genitals into her for his own sexual gratification and refused to get up for several minutes until his own daughter turned the lights on.

ORDER

The petitioner's application to expunge the report of child sexual abuse made against him is denied.

REASONS

The petitioner has made application for an order expunging the record of the alleged incident of child abuse from the SRS registry. This application is governed by 33 V.S.A. § 4916 which provides in pertinent part as follows:

² The petitioner is no longer married to this wife but presumably could have subpoenaed her to tell what she remembered of that night.

- (a) The commissioner of social and rehabilitation services shall maintain a registry which shall contain written records of all investigations initiated under section 4915 of this Title unless the commissioner or the commissioner's designee determines after investigation that the reported facts are unsubstantiated, in which case, after notice to the person complained about, the records shall be destroyed unless the person complained about requests within one year that it not be destroyed.

. . .

- (h) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under Section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Pursuant to this statute, SRS has the burden of establishing that a record containing a finding of child abuse should not be expunged. SRS has the burden of demonstrating by a preponderance of the evidence introduced at the hearing not only that "the report is based upon accurate and reliable information", but also that the information "would lead a reasonable person to believe that a child has been abused or neglected." 33 V.S.A. § 4912(10) and Fair Hearing Nos. 13,154, 12,761, 12,499, 11,660, 11,322, and 10,136.

"Sexual abuse" is defined by 33 V.S.A. § 4912(8) as follows:

"Sexual abuse" consists of any act by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

In this case, the petitioner is found to have, with the intent of sexual gratification, placed his body on top of a twelve-year-old girl who was lying on a bed and to have ground his genitals into her for some minutes failing to heed her pleas for him to get off. It must, therefore, be concluded that the petitioner molested and exploited C.E. within the meaning of the above statute. Inasmuch as the report in question is "substantiated", the petitioner's request for an order of expungement of this record from the SRS registry is denied.

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